It continued unpaid till the date of the decision on 29 May 1992 (now RM21,000). The defendant did not tender the rent lawfully due on the basis of his own contention. I hold he is therefore estopped from contending that this distress was illegal. The submission made on his behalf is just another way of saying that the landlord is claiming for more than was lawfully due. That does not vitiate the distress. The tenant's remedy is in damages or rescue only if the landlord has in fact distrained for more than is due.

The second reason why this appeal fails is that it is my view, that a claim for double rent in Malaysia is recoverable by distress up to the time the tenant quits. Lye Lin Heng's statement is good law in Malaysia by reason of the statutory option given to the landlord by s. 28(4)(a) of our Civil Law Act 1956 which is in *pari materia* with s. 16(4) of the Civil Law Act in Singapore.

In the distress suit by an affidavit dated 22 January 1992 (Enclosure 5) the plaintiff exhibited the Notice to Quit dated 28 December 1991 to support their claim that the tenancy had determined on 31 March 1992. John de Silva filed an affidavit in reply affirmed on 24 February 1992 (Enc. 11) - Nowhere in this affidavit does he challenge the validity of the Notice to Quit, effectively or at all. He merely exhibited the pleadings in the civil suit in which, be it recollected the receipt of the Notice was admitted, and chose to rely upon a legal argument that distraining for double rent was not permissible in law.

It is the opinion of this Court that if double rent is due it can be distrained for. To hold otherwise would result in an anomalous position where a tenant can avoid distress by terminating his tenancy and then contending as has been done in this case, that until a judgment is obtained in an action at some uncertain date in future, he need not pay any rent at all.

This appeal is therefore dismissed with costs both here and in the Court below.

OVERSEAS-CHINESE BANKING CORPORATION LIMITED

v.

BANHENLY HOLDINGS SDN. BHD. & 7 ORS.

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[SUIT NO. 22 (23)-51 OF 1989]
18 NOVEMBER 1991

PRACTICE AND PROCEDURE: Application for summary judgment - Overdraft facility granted to first defendant and guaranteed by the first five defendants - Allegation by the defendants contract with the plaintiff a sham, illegal and contrary to public policy - Conversion by first defendant into a bumiputera company soon after entering into the contract - Enjoyment of special bumiputra privileges - Whether there was any manipulation of Article 153 Federal Constitution - Plaintiff's solicitors involved in conversion transaction - Whether there exists collusion by the parties and contravention of public policy - Relevant facts held by plaintiff - Circumstances which ought to be investigated - Whether summary determination appropriate.

The plaintiff sued the defendants for a sum of RM1,131,462.33 granted by way of an overdraft facility to the first defendant and allegedly guaranteed by the first five defendants. The plaintiff's application for summary judgment was dismissed by the SAR and the Judge, in chambers as well as after hearing further arguments in open Court.

The main argument raised by the defendants was that soon after the contract, the first defendant, with the legal assistance and advice of plaintiff solicitors, purported to convert into a bumiputera company in order to enjoy the special privileges accorded to bumiputera companies. This made their contract with the plaintiff a sham, an illegality and a contravention of public policy, calling for reflection upon Article 153 of the Federal Constitution, which stipulates for the safeguarding of the special position of Malays. Further, there was also an attempt to defeat the policies to be followed by banking institutions laid down in the Central Bank of Malaya Ordinance 1958. The charge in favour of the plaintiff under the National Land Code was also alleged to be affected due to the transfer of shares from the first defendant to a bumiputera shareholder.

Held:

[1] There is a serious question to be tried as regards any suggestion of a manipulation of the special position given to Malays in Article 153 and any attendant collusion thereof which cannot be dealt with in a case tried summarily.

[2] It must be ascertained whether the 8th defendant's position as a Malay enjoying special privileges under Article 153 was in fact exploited to the parties' mutual benefit and if so, whether it contravened public policy and was an illegality.

[3] Whenever there is an issue or question which ought to be tried or there ought for some other reason be a trial [*Miles v Bull* [1969] 1QB 258], leave to defend must be given. These words bear a special significance in a case like the present where many of the relevant facts are under the control of the plaintiff which requires the defendant, by use of various procedures like discovery, interrogatories and cross-examination of witnesses, to elicit further facts from the plaintiff.

[4] Subsidiary defences raised, including the allegation of variation of interest rates, are also issues which must be determined in a trial proper.

[*Plaintiff's appeal dismissed; plaintiff now appealing to Supreme Court*].

Cases referred to:

*Overseas Chinese Banking Corporation Ltd. v. Lee Tan Hwa & Anor. [1989] 1 CLJ 458 / [1989] 1 MLJ 261 (**refd**)*

*David Hey v. New Kok Ann Realty Sdn. Bhd. [1985] 1 MLJ 167 at p. 170 (**cit**)*

*Ho Kok Cheong Sdn. Bhd. & Anor. v. Lim Kay Tiong & Ors. [1979] 2 MLJ 224 (**cit**)*

*Miles v. Bull [1969] 1 QB 258 (**refd**)*

Legislation referred to:

Central Bank of Malaya Ordinance 1958, ss. 37(1)(a), 38, 40(b)

Evidence Act 1950, ss. 91, 92

Federal Constitution, Articles 40, 153(2)

Rules of the High Court 1980, O. 14 r. 3(1), O. 56 r. 2(2)

For the plaintiff: John Mathew; M/s. Shook Lin & Bok

For the defendants: Siva Subramaniam; M/s. Y.S. Woo & Partners

[Editorial Note: This case was only received by us on 22 February 1993 and it was decided to report it inspite of its being decided in 1991 as it raises an interesting point of law]

JUDGMENT

Richard Talalla J:

On 17 June 1989 the plaintiff commenced an action against the defendants claiming a sum of RM1,131,462.33 said to be owing by the defendants to the plaintiff as at 10 September 1988 by reason of an overdraft facility granted by the plaintiff to the first defendant carrying interest at the rate of 10.75% per annum which the first five defendants (the defendants) allegedly guaranteed.

The defendants entered an appearance whereafter the plaintiff on 16 October 1989 applied against them for summary judgment pursuant to the provisions of Order 14 of the Rules of the High Court, 1980. The learned Senior Assistant Registrar having heard the parties in respect of that application dismissed it on 13 March 1991. The plaintiff appealed to the Judge in Chambers against the decision of the learned Senior Assistant Registrar. On 20 April 1991 the appeal was dismissed. The Plaintiff then applied under O. 56 r. 2(2) of the Rules of High Court for further argument. The application was allowed and further argument heard whereafter no further order was made except in regard to costs. The plaintiff now appeals to the Supreme Court.

The principal reason for the dismissal of the appeal was that the defendants complained that their contract with the plaintiff was against public policy and an illegal contract, because so soon as it was entered into the first defendant purported to convert into a bumiputra company by way of sham so as to enjoy the benefit of such a company as against an ordinary company. The defendants alleged that the solicitors acting for the bank in the contractual transaction were involved in the sham when they at the same time acted for the defendants in converting the first defendant into a bumiputra company. The defendants relied on the case of *Overseas Chinese Banking Corporation Ltd. v. Lee Tan Hwa & Anor.* [1989] 1 MLJ 261 for the proposition that where two parties employ the same solicitor, communications passing between either of them and the solicitor in his joint capacity must be disclosed in favour of the other, and knowledge of the solicitor must be imputed to both parties. The defendants claimed that the scheme was a veritable attempt to defeat the provisions of s. 37(1)(a) of the Central Bank of Malaya

Ordinance 1958 (the Ordinance) which provides for the policy to be followed by banking institutions in relation to the granting of advances and the extension of credit facilities, including the classes of purposes for which advances may or may not be made or credit facilities extended. The defendants alleged that the charge under the National Land Code in favour of the plaintiff was effected after the transfer of certain shares in the first defendant from non-bumiputra shareholders to the sixth defendant who is a bumiputra and claimed that the plaintiff knew of and colluded in the sham.

The defendants relied on Article 153(2) of the Constitution which is as follows:

> 153(2). Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.

The plaintiff's answer to the defendants' complaint abovestated was that the parties to the sale and purchase of the shares namely two vendors and Abdullah bin Khamis, the bumiputra purchaser, were not themselves claiming that the transaction was a sham, that the documents before the Court did not disclose illegality or a sham and the plaintiff further prayed in aid the provisions of ss. 91 and 92 of the Evidence Act 1950. To my mind the illegality of the contract as being contrary to public policy transcends these objections of the plaintiff. In *David Hey v. New Kok Ann Realty Sdn. Bhd.*[1985] 1 MLJ 167 at p. 170 a question was raised as to whether the Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs issued by Government in 1974 amounted to public policy, but the Federal Court decided that it was not necessary to decide the question, because, so the Court found, there was no suggestion in that case that the agreement to transfer the shares was void and unenforceable for lack of approval of the Foreign Investment Committee, and beyond mere reference to the Guidelines neither Counsel deigned to elaborate on the issue. The Federal Court did however study the Guidelines. To that Court it seemed the Guidelines constituted more than a political policy, reflecting as it did an economic policy of which the Court could properly take judicial notice. Thus this question, and to my mind in this instance a serious question relating to the special position provided for in Article 153 and any manipulation thereof with attendant collusion on the part of the plaintiff, as alleged in this case, have yet to be addressed by the Courts including possibly the Supreme Court. It does not seem to me an appropriate case for determination summarily by recourse to O. 14. By way of answer Counsel for the plaintiff cited the case of *Ho Kok Cheong Sdn. Bhd. & Anor. v. Lim Kay Tiong & Ors.* [1979] 2 MLJ 224 which is to the effect that non-compliance with the Guidelines did not amount to an act opposed to public policy, that the Guidelines reflect the Government's political policy and that policy is not public policy. With respect, I make no comment at this stage on the decision in the said cited case except to say that unlike this case, in that case the special position under Article 153 was not in issue. It seems to me that in this case it will have to be ascertained whether in relation to the transaction concerning the 8th defendant, as a Malay (it is not denied that he is not one) potentially enjoyed a special position and was entitled to special facilities (provided) for under Article 153 and if so whether the other parties with the connivance of and in collusion with the plaintiff exploited the situation to their mutual benefit and if so contravened public policy and acted illegally. Again it is considered that these matters should not be determined summarily but by full trial.

The plaintiff prayed in aid the provisions of s. 40(b) of the said Ordinance wherein it is affectively provided that nothing in s. 37 affects the validity of a transaction entered into in relation to an advance or credit facility or affects the right of any institution or person referred to in s. 37 or 38 to recover money advanced or enforce the security given in respect of money advanced. I did not see that s. 40(b) assisted the plaintiff at this stage. It is axiomatic that the right referred to in the section must be a legal right duly enforceable. The section cannot apply

to a purported right obtained contrary to public policy and consequently illegally. Thus the question in this case relating to public policy has to be determined first.

As I see it O. 14 r. 3(1) of the Rules of High Court provides for leave to defend to be given in the application for summary judgment where there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. I have in mind the case *Miles v. Bull* [1969] 1 QB 258 where Megarry J. said in regard to the last words of the sub-rule that they seemed to him to be very wide and to have special significance where, as in that case, most or all of the relevant facts were under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which would aid the defendant.

The learned Judge added that if the defendant could not point to a specific issue which ought to be tried but nevertheless satisfied the Court that there were circumstances that ought to be investigated, then those concluding words should be invoked. It may be that in this case the relevant facts pertaining to the issue of the special position of and facilities for a certain section of the public of this country are not facts under the control of the plaintiff. However they are not within the control of the defendant. It seems to me that the question of such position and facilities relative to the case in hand is one which requires to be determined by evidence being led from material witnesses, one of them may probably be an appropriate representative of Bank Negara who *prima facie* should be able to speak to the availability or otherwise of such special facilities. The circumstances accordingly require to be investigated.

There were other subsidiary defences, relating to the right of the plaintiff to vary the interest rates applicable to the loan and the variation of the rates by the bank which the defendants claimed to be unlawful. The plaintiff alleged that the reason for the variation, the variation being admitted, was that the loan was not serviced and interest was piling up. The defendants argued to the contrary. Another matter related to the redemption sum allegedly paid to the plaintiff by purchasers of a number of home units in the housing development of the first defendant, the subject matter of the charge and adjustable as between the plaintiff and the first defendant. The defendant guarantors complained that the amounts claimed against them as guarantors were higher than the sum claimed against the first defendant. To this the plaintiff replied that the claim for interest against the guarantors was for a later period and made reference to clause 4 of the charge which provided for the interest rate to vary after expiry of demand. Again to my mind these question had to be determined by trial in this action.

Accordingly the appeal was dismissed.